

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 466 of 2020

(Arising out of Order dated 5th March, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA 3270/2019 in C.P. (IB) 1382/MB/2017)

IN THE MATTER OF:

Mr. Vishal Vijay Kalantri

....Appellant

Versus

**Mr. Shailen Shah (Resolution Professional
of Dighi Port Limited) & Ors.**

.....Respondents

Present:

For Appellant:

**Mr. Amit Chadha, Senior Advocate with Ms.
Neha Nagpal, Advocates.**

For Respondents:

**Mr. Arun Kathpalia, Senior Advocate with
Mr. Himanshu Satija and Mr. Mahesh
Agarwal, Advocates.
Mr. Gourab Banerjee, Senior Advocate with
Ms. Aditi Sharma, Advocate.**

J U D G M E N T

BANSI LAL BHAT, J.

Mr. Vishal Vijay Kalantri, a former Director and shareholder of 'Dighi Port Limited' (Respondent No.2/ 'Corporate Debtor') has preferred the instant appeal impugning order dated 5th March, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA 3270/2019 in C.P. (IB) 1382/MB/2017 whereby

the Adjudicating Authority has allowed application filed by the 'Resolution Professional' for approval of the 'Resolution Plan' submitted by 'Adani Ports Special Economic Zone Limited' ("APSEZ" for short) (Respondent No.4). The impugned order is assailed on the ground that the Adjudicating Authority has failed to consider objections raised by the Appellant to the 'Resolution Plan' submitted by 'APSEZ' as also the objections raised by the Appellant qua the rejection of settlement proposal submitted by 'Balaji Infra Projects Limited' ('BIPL' for short).

2. For appreciating the controversy raised in this appeal, it would be appropriate to make a brief reference to the material facts bearing upon the approval of the 'Resolution Plan' of 'APSEZ' by the Adjudicating Authority.

3. The 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor' was initiated in terms of admission order dated 25th March, 2018 passed by the Adjudicating Authority in C.P. (IB) No. 1382/MB/2017. The admission order came to be challenged before this Appellate Tribunal in Appeal being Company Appeal (AT) (Insolvency) No. 139 of 2018 preferred by the present Appellant. During the pendency of the aforesaid appeal, some development in regard to settlement of claims of creditors appears to have taken place which was taken note of and the Creditors of the 'Corporate Debtor' were asked to consider the settlement proposal emanating from the Appellant. This factual position emerges from the minutes of proceedings recorded on

24th July, 2019. It appears that 'BIPL'- holding company of the promoters submitted an offer to the 'Committee of Creditors'. Meanwhile, Section 12 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) suffered an amendment. The 'Corporate Insolvency Resolution Process' continued though the Appellant and other promoters of the 'Corporate Debtor' were granted time to settle the claims of the 'Financial Creditors'. 'Committee of Creditors' was given liberty to consider all 'Resolution Plans' pending before it and approve one or other resolution plan within the given time frame. 'Committee of Creditors' was directed to have regard for the fact that the 'Resolution Plan' considered for approval was better than the settlement proposal submitted by the promoters of the 'Corporate Debtor'. Three proposed 'Resolution Plans' including the 'Resolution Plan' of the Respondent No.4 besides the settlement proposal of promoter were taken up for consideration. However, the promoter failed to deposit earnest money (EMD) as sought by the 'Committee of Creditors' in its 19th Meeting. Certain clarifications were sought from the Resolution Applicants. 'Committee of Creditors' fixed the deadline of 12th September, 2019 for promoters of 'Corporate Debtor' to submit EMD of 20% of the settlement proposal along with further details/ clarifications etc. Respondent No.4 complied with the requirements and submitted the clarifications required of it. However, the promoter did not comply. It appears that in pursuance of direction of this Appellate Tribunal, the 'Committee of Creditors' proposed to put a resolution under Section 12A of the 'I&B

Code' along with the settlement proposal for voting. 'Committee of Creditors' decided that in the event of settlement proposal not mustering support of requisite percentage of votes, 'Resolution Plan' of Respondent No.4 be put to vote. Settlement proposal was rejected by the 'Committee of Creditors' with 99.68% votes. Thereafter, 'Resolution Plan' of the Respondent No.4 was put to vote and same was approved by the 'Committee of Creditors' with 99.68% votes. Thereafter, the 'Resolution Plan' of the Respondent No.4 approved by the 'Committee of Creditors' with requisite majority was placed by the 'Resolution Professional' before the Adjudicating Authority by filing an application under Section 31 of the 'I&B Code' and the same was approved by the Adjudicating Authority in terms of the impugned order with certain modifications and the same has been assailed through the medium of instant appeal.

4. Learned counsel for the Appellant submits that in terms of the order dated 11th October, 2019, the Adjudicating Authority had reserved orders in both MA No. 3270 & MA No. 3298 of 2019. Thereafter, the constitution of the Bench changed due to elevation of the Judicial Member and both MAs were reheard on 15th January, 2020 but in the order sheet reserving of the order in regard to MA No. 3298 of 2019 was omitted.

5. We have scanned through the record to find out the factual position. It appears from copy of order dated 15th January, 2020

forming Annexure A-31 (Page 381 Vol.II of the appeal paper book) that the re-constituted Bench, after re-hearing the matter, reserved orders on MA 3270 of 2019 and MA 1560 of 2019. There is nothing on the record to substantiate Appellant's contention that MA 3298 was heard along with MA 3270 and order was reserved qua the same. The alleged fact is, therefore, not supported by record and Appellant is estopped from raising any issue on this score.

6. The factum of the BIPL/ Promoters' settlement proposal having been rejected by the 'Committee of Creditors' and the 'Committee of Creditors' having voted in favour of the 'Resolution Plan' submitted by 'APSEZ' with overwhelming majority is not disputed by the Appellant. Admittedly, the Promoter's Settlement Proposal was rejected on 17th September, 2019 while the 'Resolution Plan' submitted by 'APSEZ' was approved by the 'Committee of Creditors' with overwhelming majority of above 99.68% votes on 19th September, 2019. It is thereafter that the Appellant claims to have filed application being MA 3298 of 2019 under Section 60 (5) of the 'I&B Code' alleging arbitrary rejection of BIPL's proposal and objecting to Resolution Plan of 'APSEZ'. This appears to have been done when the application of 'Resolution Professional' under Section 31 of the 'I&B Code' was pending consideration before the Adjudicating Authority for approval of the 'Resolution Plan' of 'APSEZ'. As regards the objections raised qua the approved Resolution Plan of 'APSEZ', it is submitted on behalf of the Appellant that the Resolution

Plan required permission from the 'Competition Commission of India' prior to approval of the 'Resolution Plan' by the 'Committee of Creditors' but no such permission was submitted with the 'Resolution Plan' by 'APSEZ'. It is submitted that the Resolution Plan can be approved under Section 31 only if such plan fulfils the mandate of Section 30(2) (e) of the 'I&B Code' implying that the Resolution Plan does not contravene any provisions of law. It is submitted that in the instant case the approved 'Resolution Plan' breaches the mandate of proviso to Section 31 (4) read with Section 30 (2) (e) of the 'I&B Code' as well as Sections 5 and 6 of the Competition Act, 2002 and for this reason alone, the approved Resolution Plan being bad in law is liable to be set aside and the 'Corporate Debtor' has to be sent into liquidation. Learned Counsel for the Appellant further submits that 'APSEZ' enjoyed dominance in the Indian Port Segments and this fact is acknowledged in the impugned order but the Adjudicating Authority has failed to consider whether or not Competition Commission of India's approval has been obtained as required in proviso to Section 31 (4) of the 'I&B Code'. It is further submitted that MA No. 3298 filed by the Appellant is still pending before the Adjudicating Authority and any action with respect to the approved Resolution Plan is illegal and *non-est*. It is submitted on behalf of Appellant that BIPL has not been declared as a wilful defaulter by any Bank and the Settlement Proposal has been submitted in terms of order dated 24th July, 2019 passed by this Appellate Tribunal.

Learned counsel for the Appellant submits that the impugned order, being unsustainable, is liable to be set aside.

7. Per contra, it is submitted on behalf of the 'Committee of Creditors' that three Resolution Applicants namely— (i) 'Jawaharlal Nehru Port Trust' ("JNPT" for short), (ii) 'APSEZ', (iii) 'Veritas India Limited' ("Veritas" for short) submitted their Resolution Plans before the 'Committee of Creditors'. Resolution Plan of 'JNPT' was approved by the 'Committee of Creditors'. However, the Adjudicating Authority proposed additional conditions to be complied with by 'JNPT', which it was unable to accept. In terms of directions given by the Adjudicating Authority, the 'Committee of Creditors' was required to provide another chance to the three applicants to submit revised resolution plans. Meanwhile, a number of Financial Creditors, who were part of the 'Committee of Creditors', filed claims of more than Rs.3000 Crores. The 'Committee of Creditors' considered the promoters' offer on the basis of viability, feasibility and financial matrix in a series of meetings (17th to 22nd 'Committee of Creditors' meetings). The plan was not found to be acceptable for various reasons including the promoters having failed to deposit the EMD and non-disclosure of the source of funds of the promoter's partner SPGP Holdings (HK Limited). The Appellant's plan, when put to vote, was rejected by 99.68% of the 'Committee of Creditors' whereas the plan submitted by 'APSEZ' was approved by the 'Committee of Creditors' by majority of 99.68%. It is further submitted

that the matter pending in appeal before this Appellate Tribunal was disposed of vide judgment dated 12th March, 2020 taking note of the Judgment of the Hon'ble Apex Court in ***“Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. (2019) SCC OnLine SC 1478”*** and it was held that the Adjudicating Authority or this Appellate Tribunal cannot sit in appeal on the commercial decision of the ‘Committee of Creditors’. The matter was remitted to the Adjudicating Authority without interfering with its order dated 25th March, 2018. The Adjudicating Authority, in terms of its order dated 5th March, 2020 approved the Resolution Plan of ‘APSEZ’ which had been approved by the ‘Committee of Creditors’. It is submitted that the commercial wisdom of ‘Committee of Creditors’ cannot be reassessed within the limited scope of consideration available to the Adjudicating Authority under Section 31(1) of the ‘I&B Code’. The Adjudicating Authority while examining whether the plan conforms with the requirements of Section 30 of the ‘I&B Code’, is not required to examine commercial wisdom of the ‘Committee of Creditors’ in approving a particular plan. It is submitted that the Appellant has failed to demonstrate that the approved Resolution Plan was not law compliant, Appellant’s focus having been on showing that its plan was superior to that of ‘APSEZ’. However, the plan of Appellant has been rejected by the same voting percentage of ‘Committee of Creditors’ i.e. 99.68% which has approved the Resolution Plan of ‘APSEZ’ and reasons for rejection of Appellant’s plan and approval of plan of Respondent No.4 are reflected

in the minutes dated 13th September, 2019 of 22nd 'Committee of Creditors' meeting. It is further submitted that the objections taken by the Appellant in MA 3298/2019 are a mere reiteration of the objections already raised by him before this Appellate Tribunal in Appeal No. 139 of 2018 which have been considered in its Judgment dated 12th March, 2020. The Appellant's plan has been deliberated in various Committee of Creditors' meeting whereafter it has been rejected under Section 12A by an overwhelming majority. This Appellate Tribunal declined to interfere with the commercial wisdom of 'Committee of Creditors' as reflected in Judgment dated 12th March, 2020. Lastly, it is submitted that the admitted dues of the Financial Creditors being over Rs.3000 Crores, approval of the Resolution Plan of the Respondent No.4 by the Adjudicating Authority would not only satisfy portion of claim of the Creditors but also revive the Corporate Debtor.

8. It is submitted on behalf of the Respondent No.4- 'APSEZ' that the challenge thrown by the promoter to order of admission and approval of an earlier Resolution Plan in CA Nos.139/2018 and 722/2019 had been repelled by this Appellate Tribunal in terms of Judgement dated 12th March, 2020 and this is the third attempt by the promoter to frustrate the insolvency resolution proceedings. It is submitted that the promoter's offer of settlement to the lenders under Section 12A of the 'I&B Code' stands rejected by 99.68% votes for a variety of reasons including failure to deposit the EMD and disclose the source of funds.

Further, the promoters were declared wilful defaulters who did not have even the capacity to raise funds for depositing EMD. It is further submitted that the promoters by their actions have caused a complete downfall to the 'Corporate Debtor' which is a part of National importance. It is submitted that the Resolution Plan submitted by 'APSEZ' conformed to all legal and financial parameters and provided for value maximisation and an upfront payment of Rs.650 Crores which was approved by 'Committee of Creditors' with an overwhelming majority of 99.68%. It is submitted that the commercial wisdom of the 'Committee of Creditors' in approving 'APSEZ' plan, which has been approved by the Adjudicating Authority, is not open to judicial review. It is further submitted that mere non-adherence to the time line/procedure would not impact the approval of the Resolution Plan as the rules of procedure are only directory. It is submitted that the promoters had attended the 'Committee of Creditors' meeting when Resolution Plan of 'APSEZ' was considered and they had been provided copies of the Resolution Plan. No objection was raised by the Appellant for more than 50 days with regard to its application. It is submitted that the appeal has been preferred only to stall the implementation of the approved Resolution Plan for ulterior motives and the objections raised on technical ground would not sustain.

9. Heard learned counsel for the parties and scanned through the record meticulously. At the very outset, we may observe that the instant

case is yet another instance of the promoters not letting the goose escape from their dragnet, though it no more lays golden eggs. All possible endeavours are made by the promoters to frustrate the 'Corporate Insolvency Resolution Process' and thwart all attempts at resolution of the 'Corporate Insolvency' and revival of the 'Corporate Debtor' thereby jeopardising the legitimate interests of all stakeholders and defeating the object of legislation. This is besides the fact that each day's delay entails the consequences of increasing the liabilities and depleting the resources/ diminishing the value of assets of the Corporate Debtor. We say so as in the instant case this is the third attempt to stall the process, the earlier two efforts on the part of promoters having fizzled out.

10. Fathoming through the depths of the recorded versions of events, we find that in the 'Corporate Insolvency Resolution Process' against 'Dighi Port Limited' at the instance of 'DBM Geotechnics and Constructions Limited'- an 'Operational Creditor' of the 'Corporate Debtor'. 'JNPT', 'APSEZ' and 'Veritas Consortium' submitted their Resolution Plans. It happened in the 7th meeting of the 'Committee of Creditors' held on 22nd November, 2018. On evaluation, the Resolution Plan submitted by 'APSEZ' got the first ranking with 60.46%. The Resolution Plan submitted by 'APSEZ' being declared as the Highest Evaluated Compliant Resolution Plan was put to vote on 31st January, 2019. However, the same was rejected by 99.38% of votes by the

'Committee of Creditors'. Resolution Plan submitted by the 'JNPT' ranking second with 56.88 score, when put to vote, was approved by 99.38% members of the 'Committee of Creditors'. The Resolution Professional filed application under Section 31 of the 'I&B Code' seeking approval of the Resolution Plan of 'JNPT' already approved by the 'Committee of Creditors'. Meanwhile, 'APSEZ' submitted a revised offer of upfront cash of Rs. 650 Crores on 15th February, 2019. However, by then the Resolution Plan of 'JNPT' had been approved by the 'Committee of Creditors' and application under Section 31 of the 'I&B Code' was pending consideration before the Adjudicating Authority. Resolution Plan of 'JNPT' came to be approved by the Adjudicating Authority with certain modification as emerges from order of the Adjudicating Authority dated 8th May, 2019. However, 'JNPT' expressed its inability to accept the modifications in terms of the order dated 8th May, 2019 passed by the Adjudicating Authority. It further come to fore from record that in its 16th Meeting held on 8th July, 2019, the 'Committee of Creditors' resolved to provide one more opportunity to all the three Resolution Applicants. Around the same time, the promoter of the 'Corporate Debtor' assailed the triggering of Corporate Insolvency Resolution Process before this Appellate Tribunal. This Appellate Tribunal in terms of the order dated 24th July, 2019, provided three weeks' time to the promoters to arrive at a settlement with the creditors of the 'Corporate Debtor'. The promoters presented the contours of the offer submitted by BIPL, the promoter's holding company, to the

'Committee of Creditors'. It happened in the 17th Meeting of the 'Committee of Creditors' held on 13th August, 2019. This Appellate Tribunal, having regard to the amendment effected in Section 12 of the 'I&B Code', declined to provide more time to the parties and directed the process of resolution to continue for another approximately 90 days including the period of determination by the Adjudicating Authority. Appellant/ Promoter was granted two weeks' time to settle the matter. It was left to the 'Committee of Creditors' to consider all the plans for approval taking into consideration the viability, feasibility and financial matrix of all resolution plans. The 'Committee of Creditors', pursuant to the order of this Appellate Tribunal, directed the promoters to submit their final settlement offer along with Earnest Money Deposit. The Resolution Applicants too were directed to submit their respective improved Resolution Plans or revalidate their previous Resolution Plans. Subsequently, 'JNPT' withdrew from the fray and 'APSEZ' offered Rs.650 Crores upfront payment in addition to payment of CIRP cost and dues payable to the 'Maharashtra Maritime Board' in priority to other dues whereas 'Veritas Consortium' offered Rs.50 Crores as upfront payment and Rs. 475 Crores as deferred payment starting from 2024 with 10% equity besides payment of CIRP costs and dues of 'Maharashtra Maritime Board'. The promoter offered Rs. 680 Crores to the Financial Creditors besides Rs. 50 Crores towards the CIRP costs and payment to 'Operational Creditors'. The plan of the promoter was in the nature of a settlement offer. Admittedly, the promoter failed to submit an Earnest

Money Deposit as required by the 'Committee of Creditors' at its 19th meeting. This was in addition to failure on the part of promoter to provide clarity as regards the source of funds. 'Committee of Creditors', in its 22nd meeting held on 13th September, 2019 decided to put the settlement offer to vote. The Resolution for withdrawal under Section 12A was not approved as 99.68% of the 'Committee of Creditors' voted against the said resolution. Thereafter the Resolution Plan of 'APSEZ' was put to vote and the same was approved by 99.68% of the 'Committee of Creditors'.

11. It is not disputed that the fair value and liquidation value was determined by the duly appointed registered valuers and the approved resolution plan was considered with regard to its viability and feasibility in terms of the provisions of the 'I&B Code' and CIRP Regulations. Nothing has been brought to our notice to demonstrate that the approved resolution plan of 'APSEZ' contravenes any provisions of law. The only issue raised is that the settlement offer emanating from the promoter is better as regards maximisation of the value of the assets of the Corporate Debtor and subserves the interest of all stakeholders. This argument, in the nature of such settlement offer being superior to the approved Resolution Plan of 'APSEZ' in the context of financial matrix, viability and feasibility, cannot be accepted for the simple reason that the decision regarding feasibility and viability of a Resolution Plan qua the intended objective of 'I&B Code' is essentially a

business decision resting upon commercial wisdom of the 'Committee of Creditors' and is not amenable to judicial review/ justiciable in law. It is the settled position of law that the business decision of the majority of the Committee of Creditors is not justiciable and judicial review is limited to the Resolution Plan being in conformity with law and complying with the provisions of Section 30 of the I&B Code'. This proposition of law has been laid down in **"Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. (2019) SCC OnLine SC 1478"** wherein the Hon'ble Apex Court held:

"54. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its

business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the

Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

12. It is, therefore, manifestly clear that the judicial review qua the approval of the Resolution Plan is limited and the business decision based on commercial wisdom of Committee of Creditors cannot be assailed in appeal. In absence of Appellant being able to demonstrate

that the Adjudicating Authority has failed to consider the statutory mandate embodied in Section 31(1) of the 'I&B Code' as regard the Resolution Plan meeting the requirements of sub-sections (2) & (4) of Section 30 and that the settlement offer emanating from the promoter was rejected arbitrarily in spite of the same conforming to the requirements under the 'I&B Code' and the CIRP Regulations, we do not find any justifiable reason to interfere with the approval of the Resolution Plan of Respondent No.4 by the Adjudicating Authority.

13. In so far as the grievance regarding non-consideration of MA 3298 of 2019 is concerned, on facts, we find that the same had not been reserved for judgment as contended. This is besides the fact that the issue raised therein encompassed the grievance projected in Appeal No. 139 of 2018 which was considered and dealt with in Judgment delivered on 12th March, 2020. Thus viewed, the grievance on this score does not survive for consideration anymore and cannot be held to clothe the Appellant with a right to raise the plea of material irregularity in Corporate Insolvency Resolution Process vitiating the entire exercise culminating in approval of the Resolution Plan of 'APSEZ'.

14. Now adverting to the issue raised by the Appellant in regard to permission under the Competition Act, 2002 from the Competition Commission of India prior to the approval of the 'Resolution Plan' by the 'Committee of Creditors', be it seen that the approved Resolution Plan has not been found to be violative of the mandate of Section 30(2) (e) of

the 'I&B Code'. The finding in regard to the approved Resolution Plan, not being in conflict with any provision of law in force, has been affirmed hereinabove. In so far as the Resolution Plan being compliant with proviso to Section 31(4) of the 'I&B Code' is concerned, there is no doubt that a Resolution Plan containing a provision for combination falling within the ambit of Section 5 of the 'Competition Act, 2002', *prima facie* appears to require prior approval of the Competition Commission of India. However, it is contended by Respondents that the statutory requirement by its very nature is directory. To leave no scope for ambiguity, we may elaborate on this aspect by referring to the provision which reads as under:

“31. Approval of resolution plan. -
(4) *The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:*

Provided that where the resolution plan contains a provision for combination, as

referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.”

15. A plain reading of the provision makes it abundantly clear that the Resolution Applicant is required to obtain necessary approval required under any extant law within one year from the date of approval of the Resolution Plan by the Adjudicating Authority or within such time as may be provided in such law but not later than one year. However, this requirement of obtaining the necessary approval pursuant to approval of the Resolution Plan by the Adjudicating Authority has been subjected to one exception carved out in the form of proviso to sub-section (4) which enjoins upon the Resolution Applicant to obtain approval in regard to provision for combination, while such provision has been made in the Resolution Plan, prior to approval of such Resolution Plan by the Committee of Creditors. A cursory look at the provision engrafted in sub-section (4) of Section 31 of the 'I&B Code' reveals that while with regard to an ordinary Resolution Plan, the Resolution Applicant is required to obtain necessary approval required under any extant law within one year from the date of such approval by Adjudicating Authority only after such Resolution Plan has been

approved by the Adjudicating Authority, however, a Resolution Plan containing the provision for combination is required to obtain approval of the Competition Commission of India prior to the approval of such Resolution Plan by the Committee of Creditors. It is manifestly clear that a Resolution Plan containing provision for combination has been treated as a class apart requiring approval of the Competition Commission of India even prior to such Resolution Plan being approved by the Committee of Creditors. However, treating such requirement as mandatory is fraught with serious consequences. The issue regarding the statutory requirement of a Resolution Plan containing a provision for combination requiring prior approval of the Competition Commission of India even before such Resolution Plan is approved by the Committee of Creditors, being not mandatory and only directory in nature stands addressed by this Appellate Tribunal in **“Arcelormittal India Pvt. Ltd. v. Abhijit Guhathakurta– Company Appeal (AT) (Insolvency) No. 524 of 2019”**. Para 15 which is relevant for our purposes, is reproduced hereunder:

“15. We have noticed and hold that proviso to sub-section (4) of Section 31 of the ‘I&B Code’ which relates to obtaining the approval from the ‘Competition Commission of India’ under the Competition Act, 2002 prior to the approval of such ‘Resolution Plan’ by the ‘Committee of Creditors’, is directory and not mandatory.

It is always open to the ‘Committee of Creditors’, which looks into viability, feasibility and commercial aspect of a ‘Resolution Plan’ to approve the ‘Resolution Plan’ subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the ‘I&B Code’. In present matter already approval of the Competition Commission of India has been taken to the ‘Resolution Plan’.”

16. The view taken by this Appellate Tribunal in **“Arcelormittal India Pvt. Ltd.”** (Supra) holds the field as the same has not been reversed or set aside in appeal or other proceeding. Obtaining of requisite approval under Competition Act, 2002 with regard to the provision of the Combination in the instant case is stated to be not required as the same is below threshold limit. Objection raised to buttress the argument that in absence of necessary prior statutory approval of the Committee of Creditors qua the combination, Resolution Plan of ‘APSEZ’ is in contravention of Section 31(4) of the ‘I&B Code’, cannot be sustained and the Appellant cannot be heard to say that the approved Resolution Plan of ‘APSEZ’ being in contravention of law leaves no option but to send the Corporate Debtor into liquidation.

17. All objections raised qua the action of the 'Resolution Professional' during Corporate Insolvency Resolution Process, approval of 'Resolution Plan' of 'APSEZ' by the Committee of Creditors and its subsequent approval by the Adjudicating Authority being unfounded are hereby repelled. There is no merit in this appeal and the same is dismissed. No order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

NEW DELHI
24th July, 2020

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